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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAYMOND F. LEDERER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Executive's creating a scenario compatible with the activities of an honest and effective Congressman for the purpose of luring Members of Congress into a criminal act, despite the absence of any reason to suspect them of ongoing corruption or abuse of office, violate the principles underlying the constitutional doctrine of the "separation of powers" and the Speech or Debate Clause of the Constitution?

2. Did the government's conduct in the ABSCAM operation and prosecutions, including its failure to supervise and to control its informant and middlemen, initiation and participation in crimes, temptation of public officials without any reasonable basis for believing they were corruptible and failure to correct inadequacies and questionable techniques when confronted with them, reach the level of outrageousness and governmental overreaching violating due process standards?

3. Did the prosecution's evidentiary use of a financial report filed by petitioner in the House of Representatives in the course of his official duties as a Congressman violate the Speech or Debate Clause of the Constitution?

4. In an entrapment case, can the issue of the defendant's predisposition be determined without considering the interplay of governmental inducement and predisposition, that is, by relying solely upon the defendant's committing the criminal act without regard to his state of mind at the time when he was first approached by the government's agents and without regard to the manner in which he was approached?

5. Is the entrapment defense available only to a defendant who admits he committed the alleged crime?

6. If the Congress has the constitutional right to punish its own Members and the Executive and the Judiciary can punish them for the same offense, is the Double Jeopardy Clause violated?

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OCTOBER TERM, 1982

RAYMOND F. LEDERER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Raymond F. Lederer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on September 3, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, affirming the opinion of the United States District Court, is reported at 692 F.2d 823 (2d Cir. 1982).[1] A copy of the opinion is printed in the Appendix at A.1-81.

1. *Parties Involved:* In addition to the parties to this Petition, the judgment of the United States Court of Appeals for the Second Circuit affected Michael O. Myers, Angelo J. Errichetti, Louis

The opinion of the United States District Court for the Eastern District of New York, which was affirmed by the appellate court panel, is reported at 527 F.Supp. 1206 (E.D.N.Y. 1981). A copy of this opinion is printed in the Appendix filed with the Petition for Writ of Certiorari in the related case of *Frank Thompson, Jr. vs. United States*, which is incorporated herein. *Thompson* Appendix, 84A.

JURISDICTION

On September 3, 1982, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. A.82. A petition for rehearing with suggestion for rehearing *in banc* was denied on November 17, 1982. A copy of the judgment denying rehearing is reprinted in the Appendix at A.83-4. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Article I, §5, cl. 2:

> "Each House may determine the rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member."

Article I, §6, cl. 1:

> ". . . for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

NOTE — *(Continued)*

Johanson and Howard Criden (Docket nos. 81-1342, 81-1343, 1344, and 1446), Frank Thompson, Jr. and John M. Murphy (Docket nos. 81-1345 and 1346). The court below issued a single opinion and judgment incorporating all of these appeals. A.1-83.

Amendment V:

"No person shall . . . be deprived of life, liberty or property without due process of law; . . .

". . . nor shall any person be subject for the same offense to be twiced put in jeopardy of life or limb; . . ."

United States Code, Title 18:

§201. Bribery of public officials and witnesses

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him.

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in

any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprise

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Raymond F. Lederer, while a Member of the United States House of Representatives, was investigated and indicted for charges arising from the government's infamous ABSCAM operation. As were six other Congressmen in separate trials, petitioner was convicted of accepting money in return for promising to introduce private immigration bills.

In early 1978, the Federal Bureau of Investigation ("FBI") created ABSCAM to recover stolen art and securities. To give the illusion of a legitimate business opera-

tion, the FBI created Abdul Enterprises of which two fictitious sheiks were the owners. The company had an office in Holbrook, New York and a phony bank account in Chase Manhattan Bank. Melvin Weinberg ("Weinberg")[2] and FBI Agent Anthony Amoroso ("Amoroso"), who used the name "Tony DiVito", were portrayed as the sheik's representatives. In short, everything was done to convey the impression of wealthy Arabs interested in business ventures.[3]

Eighteen months after its inception, the operation designed to "sting" organized crime figures in their ongoing criminal endeavors evolved into a pursuit of elected officials for the purpose of placing them in a criminal scenario created by the government. This perversion of ABSCAM began during a phase of the operation's investigation of the role of organized crime in the casino industry in Atlantic City. One of the persons to come into contact with the undercover operatives was Angelo Errichetti ("Errichetti"), the Mayor of Camden and a New Jersey State Senator. He bragged to Weinberg and the agents of his political connections in New Jersey. He assured them he could pave the way for the "sheik" to obtain a casino license. At that point, efforts were made to identify and to record illegal payments to public officials who Errichetti claimed would help them secure the license.

At a meeting on a yacht, Errichetti introduced to the "sheik's representatives" Howard Criden ("Criden") and

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2. The FBI employed the talents of Weinberg, a convicted swindler and confidence man, at a salary of $3,000.00 a month. He was a professional con man retained by the federal government to commit white collar crime. So long as ABSCAM was alive, Weinberg received his salary and expenses.

3. The nature of the operation is graphically described by District Judge George C. Pratt in his opinion at 527 F. Supp. at 1209-10. A.10-12. How it worked was also described by the various district court judges in other ABSCAM cases. For example, *United States v. Kelly*, 539 F. Supp. 363, 365-367 (D.D.C. 1982); *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980).

Louis Johanson ("Johanson"), two Philadelphia lawyers representing a client who owned property in Atlantic City which he wished to develop. The purpose of the meeting was to discuss a legitimate business venture involving the sheik's building a casino on the client's property. During the cruise, Amoroso had a private conversation with Criden and Errichetti. The agent told the mayor that the sheik was concerned about his employees and wanted political protection in the event they were forced to leave their country. Amoroso later admitted that what he had in mind were Congressmen.[4] Errichetti assured Amoroso it could be done.

On the plane trip home, Errichetti and Criden talked of the sheik's willingness to pay for introductions to people with political titles. Errichetti suggested Criden enhance his client's casino deal by contacting officials to introduce to the sheik. He added that they would not be asked to do anything.

Back in Philadelphia, Criden told Johanson and another law partner, Ellis Cook, of his conversation with Errichetti and Amoroso. He asked Johanson, a City Councilman and a ward leader, to get in touch with two Philadelphia Congressmen with whom he had a political relationship.

One of the Congressman whom Johanson knew was Congressman Lederer, the petitioner. At the end of July, Johanson asked Lederer to meet with the sheik to talk about immigration matters and foreign investments in his district. Johanson told Lederer that Johanson's law firm could make a fee for the introduction. According to Cook, when Johanson told Lederer that the firm would receive $50,000.00, the Congressman told him he would be glad to do it for his friend Johanson and "all he

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4. Amoroso testified before Judge Fullam and Judge Pratt that he originated the idea of trying to bribe public officials to assist the sheik in immigration matters. A.13 fn. 4. Before Judge Pratt he stated unequivocally that he was after Congressmen specific

wanted was a $5,000.00 contribution for the spring primary". Johanson never told him that the sheik wanted him to or he had to sponsor legislation.

On September 11, 1979, Lederer arrived in New York where he was met by Johanson and Criden who drove him to the Hilton Inn. Errichetti accompanied Lederer to the meeting with the sheik's representatives. As Weinberg told him to do, Errichetti instructed Lederer how to act at the meeting.

After Lederer was introduced to Weinberg and Amoroso, he wasted no time in telling them what his priority was. He was interested in the port of Philadelphia and had obviously been told they were too. Throughout the entire meeting, Lederer reiterated his interest was bringing the sheik's money into Philadelphia.

The sheik's investing in the port and Philadelphia translated into employment for Lederer's constituents. He could not have been clearer when Lederer said, "Put my people to work and I'll show you what I can do".

The sheik's representatives assured Lederer of their employer's intentions of investing in Philadelphia. Amoroso assumed Errichetti had made this clear to him. Amoroso, in his role as president of Abdul, gave Lederer the impression that he would put the Congressman's "people to work". He certainly wanted Lederer to believe that the sheik was going to invest in America and was going to have his people working in Philadelphia. When Lederer said loyalty was a two-way street, Amoroso replied, "that's why we're gonna come into Philadelphia". In fact, the whole conversation was about the sheik coming to America to live and to invest in Philadelphia.

In this context, Lederer was willing to assist the sheik and his family as he had done for others in the past. However, before doing so, certain other conditions had to be met. First, the sheik had to be humanitarian and not an undesirable. Second, Lederer wanted to meet him.

Near the end of the meeting, the discussion was about arranging a meeting with the sheik himself. Then, after Lederer got up and was on his way out, Amoroso handed him a package containing $50,000.00, which was given to the lawyers whom Lederer understood were to receive a substantial fee. The lawyers, after giving Errichetti $20,000.00 and the sheik's representatives $5,000.00 and after placing $5,000.00 in an envelope marked for Lederer, split the money among themselves. The distribution of the fee was done outside of Lederer's presence.

Four months later, the news of ABSCAM broke. The government, in what the Department of Justice later admitted was "plainly prohibited by Department Regulations, FBI Operating Procedures, and the Code of Professional Responsibility", leaked the names of all public officials implicated in the ABSCAM operation to the news media. Thereafter, the public was inundated with statements and opinions of government officials and prosecutors. By the time Lederer stood trial, ABSCAM was a household word.

On May 28, 1980, Lederer was indicted in the Eastern District of New York for bribery, 18 U.S.C. §201(c), accepting an illegal gratuity, 18 U.S.C. §201(g), violating the Travel Act, 18 U.S.C. §1952, and conspiracy, 18 U.S.C. §371. Although he had been indicted with three others, Lederer stood trial alone.[5]

At his trial, Lederer argued that he had been entrapped. A.25-27. The government introduced no extrinsic evidence of Lederer's predisposition. It relied totally upon a video tape of Lederer's forty-five minute meeting with the undercover operatives.

After the jury's guilty verdict, the district court conducted extensive hearings to determine if the due

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5. Indicted with Lederer were Errichetti, Johanson and Criden. They were severed from Lederer after their convictions in a similar case involving Congressman Michael O. Myers.

process rights of Petitioner and the other ABSCAM defendants convicted in that jurisdiction were violated. In addition, it considered testimony from other proceedings involving ABSCAM. A.8-9. The district court ruled that there were no trial errors and Lederer's due process rights were not violated by the government.

On appeal, the United States Court of Appeals for the Second Circuit, by a panel of three circuit judges, upheld the district court's findings while conceding that the government's conduct in ABSCAM was subject to criticism. A.82. Petitioner sought a rehearing before the Second Circuit sitting *in banc*. On November 17, 1982, Petitioner's request for rehearing was denied. A.84.

REASONS FOR GRANTING WRIT

I. The Implications Of The Government's ABSCAM Investigation And Prosecution Of Members Of Congress Upon The Separation of Powers Doctrine And The Speech Or Debate Clause Of The Constitution Requires This Court To Define The Constitutional Line Separating The Executive And The Legislative Branches.

The ABSCAM operation, as it focused upon Members of Congress, invokes the constitutional doctrine of the separation of powers and the Speech or Debate Clause of the Constitution.[6] Because it raises serious questions affecting the independence of the Legislative Branch, it impacts upon the American system of government.

The issue is not whether the Executive can prosecute a member of the Legislative Branch. That question was resolved by this Court more than a decade ago in *United States v. Brewster*, 408 U.S. 501 (1972), where a divided Court held that the Speech or Debate

6. U.S. Const. art. I, §6, cl.1.

Clause did not immunize Congressmen from prosecution for bribery offenses.

The issue now arising from ABSCAM is whether the Executive can instigate and create the crime itself for the purpose of incriminating members of the Legislative Branch by tempting them without any reason to believe they were predisposed to commit a crime and then prosecuting them for it. The same dangers of a potentially vindictive Executive recognized by the Second Circuit itself in *United States v. Myers*, 635 F.2d 932, 936 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980) and this Court in *United States v. Johnson*, 383 U.S. 169, 181 (1966) and in *Brewster*, *supra* at 521-523, demand an examination of the government's conduct of an undercover operation aimed at members of the Legislative Branch.

The Second Circuit held that "the Constitution does not provide Members of the Legislative Branch with any extra protections beyond those guaranteed to all citizens". A.25. Consequently, it concluded that the Executive was not required to have a reasonable suspicion or probable cause of a Congressman's criminal activity or propensity before attempting to engage him in a criminal venture. The remedy for a legislator in such a situation, according to the panel, is "the traditional defense of entrapment". A.25. Therefore, it held that the Executive was free "to test the virtue of Members of a coordinate branch of government". A.25.

The focal point of the Second Circuit's analysis was the individual Congressional defendant and not the delicate balance between the Executive and the Legislative Branches. In this particular case, the more compelling issue is the American constitutional scheme of government. As this Court has said, "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of indi-

vidual legislators". *United States v. Brewster*, 408 U.S. 501 at 507 (1972). *See also, United States v. Johnson*, 383 U.S. 169 (1966).

In analyzing the fundamental fairness of ABSCAM as it affected petitioner, who at the time of the New York meeting and his trial was a Congressman, one must consider that FBI Agent Anthony Amoroso and informant Melvin Weinberg actively sought to lure "Congressmen" before the cameras, the bait included financial investment in their Congressional districts and employment for their constituents,[7] the expectation was that the Congressmen would agree to assist the wealthy investors immigrate into this country, and the Congressmen had never previously abused their office.[8] In short, in assessing the validity of the Executive's actions in luring the Congressmen from the halls of Congress for the purpose of testing their virtue,[9] the Court must consider that the government agents created a scenario compatible with the activities and duties of an honest and effective Congressman.

Without any reason to believe there was ongoing corruption in the Congress,[10] the Executive Branch ac-

7. In his analysis of the claims made by Congressman Richard Kelly, Judge Bryant observed that the formula used to attract the officials "included a strong legitimate attraction". *United States v. Kelly*, 539 F.Supp. 363, 371 (D.D.C. 1982).

8. Judge Pratt found "no evidence . . . that any of the defendant congressmen committed any prior similar violations or engaged in any course of conduct or other circumstances that would warrant suspicions of criminality in the conduct of their legislative affairs". *Thompson* Appendix, 148A. *See also, United States v. Kelly, supra* at 371.

9. Judge Bryant found that the "sole objective of the operation" was to test the virtue of Members of Congress. *United States v. Kelly*, 539 F.Supp. at 373. In another Second Circuit ABSCAM case, Judge Kaufman said the operation was set up "to test the faith of those in the high echelons of government". *United States v. Alexandro*, 675 F.2d 34 at 43 (2nd Cir. 1982).

10. Both the Second Circuit and the district court acknowledged the absence of any reason to suspect the Congressional defendants of prior criminal inclinations. A.25. *See also, United States v. Kelly*, 539 F. Supp. at 371.

tively went after members of the Legislative Branch in an effort to obtain incriminating words and deeds resulting in their prosecution and fall from power. Permitting the government agents to pursue members of the Legislative Branch without any basis to believe they are corrupt and to create criminal activity for the purpose of implicating them in criminality created by the Executive Branch crosses the line separating the two powers. We do not dispute that the investigation of reputed or suspected corrupt Members of Congress and the use of undercover operatives in such an investigation are legitimate. However, creating crime to ensnare or to tempt innocent legislators is not.

The danger is obvious. It makes possible for a vindictive or manipulative Executive to destroy or to intimidate a Senator or a Congressman who does not share the same political philosophy or does not support the programs of the Administration.

It has been alleged that the Congressmen and the Senator implicated in ABSCAM were targeted because they did not support President Carter and instead supported Senator Kennedy as the Democratic nominee for President. Certainly, no one has proven nor probably ever will prove the allegation. What is possible is that a device such as ABSCAM, if it is tolerated and given the imprimatur of the Judicial Branch, could be the vehicle for such political reprisals and threats in the future.

The possibility that the Executive can contort or mold legitimate activity into the basis for prosecution intimidates and dampens the independence of the Legislative Branch. Faced with the potentiality of an ABSCAM Executive, Congressmen will be reluctant to engage in dialogue with their constituents, impairing their overall function. Thus, to allow the government's agents, without any scintilla of evidence of a pattern of bribe-taking among Congressmen in general and of any indicia of predisposition of a particular Congressman to take a bribe, to create crimes in a perfectly legitimate scenario

in order to ensnare Congressmen has a chilling effect on the effective relationship between a legislator and his constituents.

Another danger is that the Executive can use the artifice of an investigation to inquire into a legitimate legislative act. He may do so for purely political reasons. Using investigators posing as constituents, the Executive could surreptitiously question a Congressman's performance of his official acts and his reasons for voting for particular legislation. Thus, the guise of an investigation could provide a device to defeat the purpose of the Speech or Debate Clause.

The mere ability to investigate any Congressman or Senator it wishes invests the Executive with enormous power to eliminate opposition. Even if the investigation reveals no wrong doing, the harm may be done. In a world where public opinion is so influenced by the news media, one cannot underestimate the devastating effect of the mere disclosure of an investigation upon a public official. The results, no matter what they are, come too late.

To hold that the safeguard against such governmental abuses is the ability of a Member of Congress to say "no", as suggested by both the Second and Third Circuits,[11] is overly simplistic and unrealistic. We do not live in a world of perfect and infallible human beings. Everyone is vulnerable to temptation. Public officials are susceptible to the same problems and pressures as everyone else. Thus, the question arises — shall the Executive be permitted to exploit human frailties for political benefit?

Will allowing the Executive Branch to go after legislators who have enjoyed excellent reputations and have never been suspected of corruption undermine that

11. *United States v. Myers*, 635 F.2d 932 at 939 (2d Cir. 1980) *cert. denied*, 449 U.S. 956 (1980); *United States v. Jannotti*, 673 F.2d 578 at 606 (3d Cir. 1982) *cert. denied*, ____ U.S. ____, 102 S.Ct. 2906, 73 L. Ed. 2d 1315 (1982).

"bedrock of our political system" — the doctrine of the separation of powers? With its unlimited resources, the administration could relentlessly seek the opposition's breaking point. Once having found it, the Executive could destroy or cripple the legislature.

Where should the line be drawn? Unfortunately, in this case, the Second Circuit panel did not draw the line separating the two powers, that is, the Executive and the Legislative Branches. Though cognizant of the inherent dangers of political reprisal, it merely stated that the government did not cross the forbidden line. In not defining the permissable limits of the Executive's power to investigate members of Congress for crimes that it created, the Second Circuit has left the door open for a vindictive or manipulative Executive to destroy or to intimidate an unsympathetic legislator or even a hostile Congress.

The task of delineating the rights and the prerogatives of two coequal branches of government cannot be left to the Executive or the Legislative Branch as suggested by the Second Circuit. A.79. It is not for the Congress to decide whether ABSCAM was illegal. The interpretation of constitutional principles rests solely with the Judiciary. Consequently, it is the Judicial Branch which must accept the responsibility of protecting the constitutional doctrine of the separation of powers and insuring the independence of the Legislature.

How the ABSCAM objectives, methodology and possibilities are treated by this Court shall become the rubric for all future undercover operations affecting the Congress. If this Court fails to consider the constitutional implications of ABSCAM, it will give its tacit approval to future investigations of possibly a greater scope and extent into the Legislative Branch.

II. The Inability Of The Circuit Courts Of Appeals To Define The Standards To Be Applied In Disposing Of Due Process Challenges To The ABSCAM Operation And The Conflict Among The District Courts Regard-

ing the Legality Of ABSCAM Demonstrates The Need For This Court To Explain And To Clarify Its Decision In *Hampton v. United States* And To Determine Itself Whether The Government's Conduct Was So Outrageous As To Invoke This Court's Supervisory Power.

The unprecedented ABSCAM operation has been the subject of national debate. The law enforcement techniques employed by the FBI have been severely criticized by people in and out of government. In fact, the government's conduct in ABSCAM has been condemned by circuit judges[12] and district judges.[13] Thus, before such techniques, especially when employed to ensnare a member of the Legislative Branch, receive a final stamp of approval, this Court should examine the government's ABSCAM investigation in light of its impact upon the due process rights of the individuals involved and, at the same time, define what the *Hampton* "due process analysis"[14] requires.

Despite a professed commitment to protect the rights of individuals against the dangers inherent in undercover operations using informants, the Department of Justice failed miserably to follow its own guidelines in the ABSCAM investigation. The operatives went uncontrolled and unsupervised, they initiated crimes, they failed to monitor and to direct the activities of informant Melvin Weinberg and other middlemen, they tempted public officials without any reasonable basis for believing they were corruptible, they deputized middle-

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12. *See, United States v. Jannotti*, 673 F.2d at 612 (Judges Aldisert and Weis dissenting).

13. *See, United States v. Jannotti*, 501 F.Supp. 1182 (E.D. Pa. 1980); *United States v. Kelly*, 539 F.Supp. 363 (D.D.C. 1982). In another case involving Congressman Jenrette, Judge Penn reportedly has been critical of the government's conduct in ABSCAM. However, he has yet to issue an opinion.

14. *United States v. Hampton*, 425 U.S. 484 (1976).

men to set up and bring in the victims of the scam and they failed to correct inadequacies and questionable techniques when confronted with them — all of which were in contravention of the Justice Department's own guidelines and contradicted what Assistant Attorney General Heymann swore were the procedural safeguards employed in such operations and in ABSCAM specifically.

A Senate select committee investigating the ABSCAM operation found that Weinberg shared in at least one and probably more bribes intended for an official, repeatedly lied under oath during the ABSCAM trials and grand jury proceedings, received unauthorized gifts, failed to record all his conversations with suspects, continually duped his FBI superiors and was laxly supervised. The committee concluded that the FBI's conduct of the investigation "created unnecessary and undue risks to civil liberties".[15]

Despite their dismissing due process attacks upon the convictions of ABSCAM defendants, both the Second and Third Circuit Courts conceded that the government's conduct in ABSCAM was not unquestionable and was subject to criticism.[16] How the appellate courts reconciled their own reservations about the government's conduct in ABSCAM and their ultimate conclusion that it did not violate the defendant's due process rights is unclear.

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15. It would be impossible to catalog the multitude of instances of illegalities, improprieties, irregularities and inadequacies of the government's conduct in ABSCAM within the space permitted. Suffice it to refer to a sampling of the findings and criticisms of those who have examined ABSCAM. Only a full review on certiorari will reveal the totality of the government's overreaching.

16. Judge Newman wrote, "We are not passing judgment on the wisdom of the ABSCAM investigation, nor on whether the means by which is was conducted conformed to internal administrative standards of the Department of Justice or to other standards that the Executive Branch might choose to adopt or the Legislative Branch might require. . . . The conduct of the investigation, though

While recognizing that this Court has established a separate constitutional defense based upon due process principles where the government's conduct and participation in criminal opportunities created by it is so outrageous as to require the acquittal of even a predisposed defendant, both the Second Circuit and the Third Circuit failed to clearly define the standard of outrageousness against which they tested the ABSCAM operation.

It is obvious that they were not sure of the standards required in the due process analysis. In fact, the Third Circuit majority acknowledged the elusiveness of a definition. It stated:

> "If the contours of the entrapment defense are imprecise, we have at least been able to make an effort to delineate them. A similar delineation of the conduct circumscribed by the due process defense is, at best, elusive. Part of the difficulty stems from the differing views by those who must interpret the constitutional standard as to what are 'immutable and fundamental principles of justice.'" *United States v. Jannotti*, 673 F.2d 578 at 606 (3d Cir. 1982).

Likewise, the Second Circuit found the definition lacking. In fact, it appeared that the panel did not know what the boundaries were. Throughout its opinion, the panel referred to the "outrageous" or due process standard as a vague concept. For example, in discussing the government's conduct, Judge Newman stated:

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subject to some criticism, affords no basis for rejecting the convictions". A.79-80.

Similarly, the Third Circuit warned that its decision in the *Jannotti* case should not be considered an "imprimatur either of approval or disapproval on the government's conduct". The majority indicated that it had differing views as individuals on the "necessity or advisability of the entire ABSCAM project". 673 F.2d at 610.

"*Whatever may be the due process* limit of governmental participation in crime, it was not reached here". (Emphasis supplied). A.29.

"*Whatever conduct might transgress the standard* outlined in *Hampton* and *Russell*, the facts of the investigation are not even close to the line". (Emphasis supplied). A.41.

"Perhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness. *Wherever those limits [due process] might be*, they have not been crossed in these cases". (Emphasis supplied). A.43.

Yet, two district judges, Judges Fullam and Bryant, who had the opportunity to assess the credibility of the witnesses during extensive hearings, found that the bounds of fair play had been exceeded and the government's conduct was outrageous. In their view, the due process standard had been violated. *See, United States v. Jannotti*, 501 F.Supp. 1182 (E.D. Pa. 1980); *United States v. Kelly*, 539 F.Supp. 363 (D.D.C. 1982).

This uncertainty with respect to the definition and the parameters of the "due process" defense is understandable. Since this Court's decision in *Hampton*, there has been no articulation of what constitutes "outrageous" conduct so as to invoke the judiciary's supervisory power over law enforcement and the administration of justice. Though district courts and circuit courts have entertained such claims, the Supreme Court has not decided any case involving the entrapment and due process defenses in the context of an undercover operation of the scope and extent of ABSCAM. This case presents the opportunity for this Court to issue the definitive word on the parameters of these defenses and the differences between them. In addition, it points out the need for this Court to establish the limits and standards of law en-

forcement activities in the government's instigation of crimes which it intends to prosecute.

III. The Dispute Among The Federal Courts Regarding Whether A Defendant's Predisposition In An Entrapment Case May Be Proven Solely By His Committing The Act And Without Considering The Governmental Inducement Requires Resolution By This Court

Where a defendant has been induced to commit a crime by the government's agents, he cannot be convicted unless he was "predisposed". *United States v. Hampton*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). Thus, the government must prove beyond a reasonable doubt that the defendant possessed a criminal predisposition when the government agents presented him an opportunity to commit the crime. *Sorrells v. United States*, 287 U.S. at 442.

What is "predisposition" and how to determine a person's predisposition are questions which have plagued the courts. Admittedly, proving a defendant's predisposition may be difficult. Nevertheless, because there is lacking any evidence of prior bad conduct or reasonable suspicion of criminal intent does not excuse the government from proving criminal predisposition. To rely solely upon a defendant's action at the time of the commission of the crime relieves the government of its burden and effectively eliminates the entrapment defense because it ignores the equally important factor of governmental inducement.

Entrapment occurs when the government agents "implanted the criminal design in the mind of the defendant". The inducement causes the act. Consequently, it is when the inducement is made and not when the subsequent action occurs that is the relevant time frame for determining a defendant's predisposition.

Equally important is the inducement itself, that is, the type of and manner in which the inducement is presented. Thus, any attempt to determine predisposition without a full evaluation of inducement is worthless.

Lederer requested the standard jury instruction on the law of entrapment as approved by this Court in *United States v. Russell*, 411 U.S. at 427. He requested that the jury be instructed to acquit him if it had a reasonable doubt whether he had "the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the government". Over Lederer's objection, the trial judge instead instructed the jury that the defense applies only to a person who was "unwilling to commit an unlawful act until induced or persuaded" by government agents. Thus, the district court equated lack of "predisposition" with the "unwillingness" to commit the crime.

The trial court further told the jury that the time for "determining the question of predisposition" was the September 11th meeting, the videotape of which had been shown to the jury. The relevant time for determining the defendant's predisposition is not when the crime is being committed or has been completed but when the defendant is first approached by the government's agents with the criminal design. *Sorrells v. United States*, 287 U.S. at 442. It is the defendant's state of mind and inclinations before his initial exposure to the government agent that is the focal point of the inquiry. Thus, the jury was precluded from determining whether the criminal seed had been sown by the government agents prior to the meeting.

Similarly, the Second Circuit rejected petitioner's claim that he had been entrapped as a matter of law. Obviously, because it could find no other indicia of a prior criminal intent or purpose, the panel also relied upon the videotape of the September 11th meeting. It concluded that petitioner's predisposition was established by his

"ready response" to the inducement at that meeting. A.26-27.

The approach taken by the district court and the circuit court demonstrates a misapprehension of the law of entrapment. The emphasis was placed not on whether the government had induced petitioner to commit the crime but whether he performed the criminal act. The problem with this approach is that it puts the proverbial "cart before the horse".

The error in the district and the circuit courts' interpretation and application of the entrapment defense is apparent and emphasized in this particular case. Both ignored the manner in which the government approached the petitioner to get him to come to the meeting in the first instance. They overlooked the lure of financial investments in petitioner's Congressional district, which District Judge Bryant characterized as "legitimate incentives designed to encourage apparently innocent persons. . .". *United States v. Kelly*, 539 F. Supp. 363 at 371 (D.C.C. 1982). According to the government's evidence, the delegated middlemen, Criden and Johanson, were dispatched to bring in Congressmen in July and almost immediately thereafter Johanson asked petitioner to meet with representatives of a wealthy sheik "to talk about immigration matters and finances in the district".

There are cases where a problem will not arise because the inducement and the commission of the crime occur simultaneously. It is in such a case as this one where the initial contact by the government agents took place a few months before the September 11th meeting that the problem arises. How petitioner was first approached and what transpired from the first contract until the meeting is pertinent and relevant to the issue of government inducement.

No where in the decisions of this Court is there language from which one can conclude that predisposition may be proven by reference solely to the defendant's

commission of the crime. In fact, in the two most recent entrapment cases decided by this Court, *Hampton* and *Russell*, the element of predisposition had been conceded. This Court has not given any direction as to the requisite proof of criminal predisposition.

If the government is permitted to mold and manufacture the "ready response" evidence and then rely upon it as the sole evidence of predisposition, there will be no entrapment defense. In effect, proof of the alleged criminal act is all that the government would have to prove. Inducement would become irrelevant and the government could dangle the largest carrot for anyone prior to the criminal scene which it has written, directed and produced for later display to a jury to prove a defendant's predisposition. Therefore, it is necessary to clarify the relationship between inducement and predisposition and to resolve the confusion surrounding the sufficiency of "ready response" evidence of predisposition.

IV. Whether Prosecutorial Use Of A Report Filed By A Congressman In the House of Representatives Violates The Speech Or Debate Clause Of the Constitution Has Not And Should Be Decided By This Court.

The prosecution, over objection, introduced a copy of the Ethics and Financial Disclosure Statement which petitioner had filed with the Clerk of the House of Representatives on June 2, 1980. Ruling on the objection, the district judge found that petitioner had waived the protection of the Speech or Debate Clause[17] by filing it — a similar argument made by the government and rejected by this Court in *Helstoski v. Meanor*, 422 U.S. 477 (1979).

The use of the disclosure statement at petitioner's trial was improper and unconstitutional if it was pro-

17. U.S. Const. art. 1, §6, cl. 1

tected by the Speech or Debate Clause. Members of the Congress may not be questioned about their "legislative acts" or the motivation for the performance of those acts. *United States v. Johnson*, 383 U.S. 169 (1966); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Hence, the question becomes: Does the financial statement constitute a "legislative act" within the meaning of the privilege?

The Speech or Debate Clause has not been literally construed. It has been interpreted "broadly to effectuate its purposes". *United States v. Johnson*, 383 U.S. at 180. Within its protective ambit is anything "generally done in a session of the House by one of its members in relation to the business before it". *Kilbourn v. Thompson*, 103 U.S. at 204. It extends to "the communication process by which Members participate in committee and House proceedings with respect to . . . matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606 (1974).

The Constitution specifically provides that the House may determine its own rules and proceedings. U.S. Const. art. I, §5, cl. 2. In filing the Ethics and Disclosure Statement with the Clerk of the House, Lederer was complying with House rules, which were established to monitor Members' observance of the limitations on outside earned income. RULES OF THE HOUSE OF REPRESENTATIVES, RULES XLVII, 95th Cong., 2nd Sess. 635-36 (1979). Thus, because "keeping its own house" in order is the constitutional prerogative of the House, anything done in that regard, including the filing of reports, is shielded by the Speech or Debate Clause.

This case does not involve a prosecution for filing a false financial report. If it did, there would be no question that it was permissable to use the report at trial. Here, the prosecution used the report in an unrelated prosecution. Whether this evidentiary use was violative of the Speech or Debate Clause is an important issue which has not been and should be addressed by this Court.

V. This Court Should Settle The Conflict Among The Circuits On The Issue Of Whether A Defendant Asserting An Entrapment Defense Must First Admit The Elements Of The Crime Charged, Including the Requisite Criminal Intent.

It has generally been assumed that entrapment is a defense available only to a defendant who admits that he has committed the crime charged. What happens to the defendant who agrees that he was present at a governmentally produced scene because he was induced to come there but maintains that what he did there was equally consistent with innocence? Is he deprived of the opportunity to have a jury decide in the first instance whether he had committed the crime because he also requests that they decide whether he was entrapped if they resolve the first issue against him?

The government's own evidence regarding the petitioner's prior intent or reason for going to the September 11th meeting was elicited through Ellis Cook. According to Cook, Johanson told him that Lederer only wanted a $5,000.00 campaign contribution from the payment intended for his friend Johanson's law firm. While acknowledging that in some cases there may be a "close question as to whether money was received as an illegal bribe or a lawful contribution", A.46-47, the Second Circuit panel held it against the Petitioner because he did not testify at trial that he thought he was receiving a political contribution. It said, ". . . he made no claim at trial that he thought the shiek's representatives were making a donation to his campaign. His sole defense was entrapment". A.47, fn 20. Thus, because petitioner argued that he was induced by the government to come to the meeting to receive the payment, the appeals court would preclude him from submitting to the jury the issue of whether the payment was illegal (a bribe) or legal (a campaign contribution).

The jury should be first asked to decide whether a defendant has committed a crime. If it decided that he

has, the jury can then decide whether he should be acquitted because he was entrapped, having been induced by the government to commit the acts which he had not been predisposed to do. The jury should not be precluded from deciding the issue of guilt because the defendant chose to argue entrapment.

The Second Circuit has had the opportunity to canvass the circuits to find how they treat this issue. In *United States v. Valencia*, 645 F.2d 1158 (2d Cir. 1980), it detailed the state of the law in each circuit. It concluded that "the circuits appear to be in conflict, our own cases are not altogether consistent, and the Supreme Court cases do not address the question". *Id.*, at 1172.

The resolution of this splitting question has important implications in a criminal intent case. Possibly a defendant committed the physical acts charged but had not possessed the criminal intent.[18] *See*, *United States v. Greenfield*, 554 F.2d 179 (5th Cr. 1977). Depending upon the circuit in which he is tried, the defendant can or cannot argue that he was entrapped if he doesn't first admit all of the elements of the crime charged. *See*, *United States v. Valencia*, 645 F.2d at 1170.

Now is the time for this Court to settle this question in the interest of uniformity among the circuits.

VI. This Court Has Not Decided Whether The Double Jeopardy Clause Of The Constitution Has Been Violated Where A Member Of Congress Has Been Subjected To Punishment By The Executive And The Judicial Branches On The One Hand And By The Congress On The Other For The Same Offense.

Implicit in the Second Circuit's opinion is the rationale that even though the Congress may punish or ex-

18. For example, in the ABSCAM cases, the government cleverly mixed together legal and illegal inducements. If the defendant chose to submit the entrapment issue to the jury, he would have to admit unwillingly that he was induced to help the sheik for a bribe and not for the promise of investments in his Congressional district.

pel one of its own members for wrongdoing, the Executive can prosecute and the Judiciary can also punish that member for the same wrongdoing. Does this double punishment violate the Double Jeopardy Clause?[19]

If there is unconstitutional double punishment, then only one Branch can punish an errant Member of Congress. Which one shall it be?

Obviously, the answers to these questions raise important issues bearing upon the respective rights and prerogatives of the three branches of government. Thus, because these issues have not been answered, this Court should examine this case in light of the constitutional principles of the separation of powers and the double jeopardy clause.

CONCLUSION

For the reasons set forth in this Petition and in the petitions filed by the other "parties involved" who are identified at page 1 of this Petition,[20] a writ of certiorari should issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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19. U.S. Const. Amend. V.

20. The factual statements and the reasons for granting a writ of certiorari set forth in the related petitions of Michael O. Myers, Angelo Errichetti, Louis Johanson, Howard Criden, Frank Thompson, Jr. and John M. Murphy are incorporated herein and adopted by Raymond F. Lederer insofar as they apply to and are consistent with his Petition.